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May 18, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: November 4, 2004

Case No.: TIA-0307

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits based on the employment of her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker did not have an illness related to work at the DOE. The OWA accepted the Panel's determination. The Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have determined that the appeal should be denied.

*I. Background*

*A. The Relevant Statute and Regulations*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an

application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

## B. Procedural Background

The Worker was employed at the Paducah Gaseous Diffusion Plant (the site) for 11 years. The Applicant filed a Subpart D application, claiming that renal failure, a lung condition, and skin cancer/Karposi sarcoma resulted from toxic exposures at DOE. The Applicant stated that the illnesses arose after a workplace explosion in which the Worker broke his hip.

The Physician Panel issued a negative determination. The Panel found that the Worker's conditions were complications of vasculitis. The Panel stated that the site and accident descriptions did not list any toxic substances that are associated with vasculitis. The Panel stated that the condition can be a response to an infection.

The Applicant filed an appeal. The Applicant challenges the renal failure determination. She reiterates that the condition arose after the explosion in which the Worker broke his hip. She states that uranium can cause renal failure and that it was a major radiological concern in the old feed plant (C-410) building.

## II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's argument - that the renal failure followed the explosion in which the Worker broke his hip - does not indicate Panel error. The Applicant does not challenge the diagnosis of vasculitis, the lack of an association between vasculitis and the Worker's exposures, and the association of vasculitis with the Worker's conditions. The fact that toxic exposure can cause renal failure does not mean that it did so in this instance.

As the foregoing indicates, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's grant of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0307, be, and hereby is, denied.
- (2) The denial pertains only to the DOE appeal and not to the DOL's review of these claims under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: May 18, 2005